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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,
Petitioner,

v.

RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC., AND OTHERS,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a church property dispute between a national church organization and a local church corporation, did the state supreme court correctly hold that there was no clear error in the trial court's findings of fact to the effect that the local church corporation was hierarchical in matters of faith and polity but congregational in terms of property ownership?

Table of Contents.

Question presented i

Statement of the case 1

Argument 6

I. Granting the petition would not afford the court an opportunity to revisit *Jones* v. *Wolfe*, because the Massachusetts courts did not employ the neutral principles doctrine 6

II. The judgment below does not conflict with prior decisions of this Court or any state court of last resort 9

Conclusion 13

Table of Authorities Cited.

CASES.

Antioch Temple, Inc. v. Parekh, 383 Mass. 854 (1981) 6, 10

Jones v. Wolfe, 443 U.S. 595 (1979) 6, 7, 8, 9, 13

Draskovich v. Pasalich, 280 N.E.2d 69 (1972) 11, 12

Fortin v. Roman Catholic Bishop of Worcester, 416 Mass. 781, *cert. den.*, 114 S.Ct. 2164 (1994) 7

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1954) 10, 11

TABLE OF AUTHORITIES CITED (CONT'D)

Maryland and Virginia Eldership v. Church of God at Sharpsburg, 249 Md. 650 (1968), *vacated and remanded*, 393 U.S. 528 (1969), *affirmed on remand*, 254 Md. 162 (1969), *appeal dismissed*, 396 U.S. 367 (1970) 6, 9n

Piletich v. Deretich, 328 N.W.2d 696 (1982) 11, 12

Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia v. Russian Orthodox Church of the Holy Resurrection, Inc., 418 Mass. 1001 (1994) 5, 7, 8, 9, 11

Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696 (1976) 10, 11, 12

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) 6

STATUTES AND RULES.

Rules of the United States Supreme Court

Rule 10.1(b) 9, 11, 12
Rule 10.1(c) 9, 10

STATEMENT OF THE CASE

Respondents are the Russian Orthodox Church of the Holy Resurrection, Inc. ("Corporation") and the members of the Corporation's board of directors. Respondents present the following statement to correct inaccuracies and omissions in the statement of the case made by the petitioner, Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia ("Synod"). In the following statement, all facts not taken from the opinions of the state courts are drawn from the appellate record.

The Russian Orthodox Church. The Orthodox Church became established in Russia in the 10th century. Early in this century, after the Bolshevik Revolution, many of the faithful fled Russia. They formed a new organization to preserve their independence from the post-revolutionary church, which was controlled by the government of the Soviet Union. The new organization became known as the Russian Orthodox Church Outside of Russia ("ROCOR"). The Synod serves essentially as the executive board of ROCOR.

In 1956, ROCOR's Council of Bishops promulgated its "Regulations". The Regulations articulate the organizational structure of ROCOR.

ROCOR is not the only umbrella organization for Russian Orthodox churches located outside the former Soviet Union. At least two other umbrella organizations have existed for many years.

The Corporation. Russian Orthodox Church of the Holy Resurrection, Inc. is a Massachusetts corporation formed in 1952. The Corporation's Articles of Organization state its purposes as follows:

> To unite the faithful around the parish church according to the teachings, canons, customs and rules of the Russian Orthodox Church, in order to satisfy the

> religious needs of the members of the parish and to uplift their spiritual and moral level.

Nowhere in the Articles of Organization is there any mention of ROCOR or the Synod.

Under Massachusetts law, the Corporation is a separate legal entity; it is not a subsidiary of any other entity. The members of the Corporation control membership. Neither the Synod nor any member of the Synod is a member of the Corporation. The members of the Corporation elect their own officers and directors.

At its inception the Corporation chose to affiliate with ROCOR and to adopt a form of by-laws suggested by the Synod. The By-laws state the purposes of the Corporation in words identical to those in the Articles of Organization. The By-laws provide that the Corporation is affiliated with ROCOR and that any amendment of the By-laws must be ratified by the Synod. The Articles of Organization, however, contain no such provisions.

Real estate. In 1952 the Corporation purchased certain parcels of land, including a church building and a parsonage. The deed contained no mention of ROCOR or the Synod. The Synod contributed none of the purchase price and never paid for maintenance, insurance, or other costs of the property. In 1973 the Corporation sold the parsonage. None of the proceeds of the sale went to the Synod. In 1980 the Corporation sold another house, which it had acquired with its own funds in 1975. Again, none of the sale proceeds went to the Synod. There is no evidence that the Corporation sought the Synod's approval for any of these real estate transactions.

Evolution of the dispute. In the mid-1980's, certain controversies arose between the Synod and a substantial number of its clergy, parishes, and other organizations. A mass exodus ensued. In 1986 and 1987, approximately twenty-one parishes,

convents, monasteries, missions, and communities terminated their affiliation with the Synod.

The Synod made no effort to claim any property from nineteen of the twenty-one organizations which quit the Synod. The Synod asserted claims only against the Corporation and one other entity.

The 1987 meeting. On January 4, 1987, the members of the Corporation voted to amend their Articles of Organization so as to allow their By-laws to be amended without the consent of any third party. The members then voted to adopt revised By-laws which omitted mention of the Synod. Under the corporate laws of Massachusetts, these votes were lawful and proper.

Property ownership in the Russian Orthodox Church. The historical pattern of property ownership in the Russian Orthodox Church before the Bolshevik Revolution was described by an expert witness as a "mosaic" or "crazy quilt". The authorities of the central church owned some church buildings, but many were owned by tradesmen, by noblemen, by individual monasteries, by ambassadors, and by other private individuals. The three great cathedrals of the Kremlin are a prime example; they were part of a state palace, owned as private property by the imperial family.

The private owners of churches — tradesmen, noblemen, monks, ambassadors, and czars — accepted the jurisdiction of the bishops of the Russian Orthodox Church in ecclesiastical matters, but they retained private ownership of their church property. Each private property owner recognized that his bishop had the exclusive right to appoint clergy and to dictate the terms of worship, but the owner did not thereby surrender secular control of the property. Private ownership co-existed with episcopal authority in the same church building.

The same pattern which existed within Russia before the Revolution spread abroad after the Revolution. Among the

Russian Orthodox faithful outside Russia many church properties are privately owned. Bishops control the form of religious services in such churches, but do not control the property itself.

The dichotomy between private ownership and ecclesiastical jurisdiction formerly existed in the Roman Catholic Church, where it caused great controversy. From the late 18th century to the early 20th century, the Roman Catholic Church struggled with the situation. Eventually the Church established rigid canons which require the diocesan bishop to hold legal title to each church. In this way, ecclesiastical jurisdiction and secular ownership were united in the Roman Catholic Church. The Russian Orthodox Church never took this step.

The voluntary nature of Orthodox parish affiliations. The Russian Orthodox Church, like most Orthodox churches, is "intentional". In other words, the Orthodox faithful gather themselves together and form a parish group. Then they seek out a bishop and voluntarily affiliate themselves with him and his umbrella organization. As a consequence, there is much coming and going of parishes and clergy among Orthodox churches such as ROCOR.

ROCOR's dispute resolution procedure. ROCOR's Regulations establish a procedure for resolution of certain ecclesiastical disputes. According to the Synod's Secretary, however, ROCOR never has used its dispute resolution mechanisms in a case such as the present one.

The Synod's statement of the case.The Synod's statement of the case includes several assertions which warrant comment.

(a) *The ecclesiastical parish*. Pervading the Synod's petition is a profound misunderstanding: the Synod thinks that it sued only a parish. Throughout its petition the Synod refers to Respondents only as "the parish". The Synod never comes to grips with the fact that Respondents are a Massachusetts corporation and its board of directors.

A parish is a canonical entity, created and sustained by ecclesiastical authority. The primary defendant in the present

action, however, is not an ecclesiastical parish; it is a Massachusetts corporation, created and sustained by the civil laws of Massachusetts. The distinction between an ecclesiastical parish and a civil corporation is more than semantic. The Synod studiously ignores the distinction, apparently to avoid the awkward fact that the Corporation is an independent legal entity.

(b) *The Synod's polity*. The Synod repeatedly asserts that the Massachusetts courts have "transformed" ROCOR into a non-hierarchical church. The Synod complains, for example, that the Massachusetts courts "have imposed a congregational polity" on ROCOR. Petition 22.

The Synod's protests imply that the Massachusetts courts found or ruled that the organization of ROCOR is congregational. The implication is false. Nowhere in the three opinions of the Massachusetts courts is there any finding or ruling to the effect that ROCOR is congregational. The Massachusetts courts expressly acknowledged that ROCOR is hierarchical in matters of faith and practice. *Primate and Bishops' Synod* v. *Russian Orthodox Church of the Holy Resurrection, Inc.*, 418 Mass. 1001 (1994).

(c) *The "seizure"*. The Synod asserts that in 1987 the Corporation "seize[d]" (Petition 2) or "appropriat[ed]" (Petition 8, n.3) the church building. Nothing so colorful occurred. In fact, nothing at all occurred. Title to the property has not changed since the Corporation purchased the church in 1952, and the Corporation has had uninterrupted possession of the property since 1952.

(d) *The 1956 Regulations*. The Synod mistakenly asserts that the Corporation was organized under ROCOR's Regulations. Petition 2. Actually the Corporation was organized in 1952, four years before the Regulations came into being.

ARGUMENT

I. Granting the Petition Would Not Afford the Court an Opportunity to Revisit *Jones* v. *Wolfe*, Because the Massachusetts Courts Did Not Employ the Neutral Principles Doctrine.

According to the Synod, the issues presented by this case revolve around the merits and consequences of *Jones* v. *Wolfe*, 443 U.S. 595 (1979). The Synod contends that the present case illustrates widespread confusion and bias caused by *Jones'* approval of the neutral principles doctrine. The Synod's solution is simple: overrule *Jones*. Petition 9. That solution is academic, however, because the present case does not involve *Jones*. The Supreme Judicial Court did not employ the neutral principles analysis; it employed the traditional structural analysis.

Not all courts use the neutral principles analysis to settle church property disputes. The Constitution leaves the courts free to adopt any one of several approaches. *Jones* v. *Wolfe*, 443 U.S. at 602. Many courts use a method which has evolved from *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872). This method classifies churches according to their hierarchical or congregational structure.

The courts have identified three points along the spectrum of church organizations. At one end of the spectrum is the true hierarchical type, exemplified by the Roman Catholic Church, in which the local church has no separate existence. At the other end of the spectrum is the true congregational type, in which the local church has no affiliation to any central authority. A third type occupies the middle of the spectrum; the local churches of this type accept a central authority in ecclesiastical matters but retain their independence in secular matters. *See, e.g., Antioch Temple, Inc.* v. *Parekh*, 383 Mass. 854, 860-62 (1981); *Maryland and Virginia Eldership* v. *Church of God at Sharpsburg*, 249 Md. 650, 664 (1968),

vacated and remanded, 393 U.S. 528 (1969), affirmed on remand, 254 Md. 162 (1969), appeal dismissed, 396 U.S. 367 (1970).

The Massachusetts courts traditionally have employed the hierarchical/congregational analysis to resolve church property disputes. Thus, in *Fortin* v. *Roman Catholic Bishop of Worcester*, 416 Mass. 781, 786, *cert. den.*, 114 S.Ct. 2164 (1994), the Court commented that "this court has, in the past, focused primarily on the distinction between hierarchical and congregational church structures . . .".

The Massachusetts courts have applied the neutral principles analysis as a rule of decision only once, and not in this case. "This court has never expressly taken the 'neutral principles of law' approach to a church property dispute." *Fortin*, 416 Mass. at 786. The Court applied that approach for the first and only time in *Fortin*.

The final state court decision in the present case was a rescript opinion of the Supreme Judicial Court, reported at 418 Mass. 1001 (1994), reviewing a decision of the Appeals Court, reported at 35 Mass. App. Ct. 194 (1993). A review of these decisions will demonstrate that the courts did not employ the neutral principles analysis.

In describing the issue presented on appeal, the Supreme Judicial Court made no reference to *Jones* v. *Wolfe* or the neutral principles doctrine. The Court observed that in the intermediate appellate court, the Synod had presented a narrow and specific issue for appellate review: "[t]he issue argued before the Appeals Court was that the judge's findings were clearly erroneous." 418 Mass. at 1001.

This was a fair summary. The Synod presented no constitutional issue to the Appeals Court, nor did it question the wisdom of *Jones*. It argued only that the trial judge's key findings were clearly erroneous. The Appeals Court itself described the Synod's appeal as follows:

> The Church has appealed, claiming that the finding that the parish is congregational as to the ownership and control of its property is clearly erroneous. . . .

35 Mass. App. Ct. at 195. This appellate issue has nothing to do with the neutral principles analysis of *Jones* v. *Wolfe*. It concerns only the hierarchical/congregational analysis, pursuant to which the trial judge found the Corporation to be hierarchical in matters of faith and practice but congregational in terms of property ownership. Petition 21a.

The opinion of the Supreme Judicial Court does not even cite *Jones* v. *Wolfe*. The Court employed as a rule of decision only its traditional hierarchical/congregational analysis, focusing upon the Synod's argument that key findings of fact were clearly erroneous. "Our review of the record brings us to the same conclusion, namely, that the judge's findings of fact were not clearly erroneous and hence must stand." 418 Mass. at 1001. Neither *Jones* nor the neutral principles approach were at issue.[1]

The Supreme Judicial Court concluded its opinion by affirming the judgment "for the reasons stated in the opinion of the Appeals Court". 418 Mass. at 1002. The Appeals Court's opinion therefore is relevant to this Court's decision on the Synod's petition.

The Appeals Court did not employ the neutral principles approach. The Court analyzed and decided the case entirely under the traditional hierarchical/congregational approach. 35 Mass. App. Ct. at 195-200. The Court mentioned neutral principles only in a footnote, observing that under the neutral principles approach "we would reach the same result as we reach under the traditional principles . . .". 35 Mass. App. Ct. at 196, n.3.

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[1] The Court invoked *Jones* only to point out that the neutral principles approach would have produced the same result as the structural approach. 418 Mass. at 1002.

By granting the Synod's petition, therefore, this Court would achieve nothing. Since the Massachusetts courts did not rely upon the neutral principles approach, this Court cannot use the present case to clarify *Jones*. The ony question presented to this Court is whether the Supreme Judicial Court correctly held that trial court's findings of fact were not clearly erroneous. In answering such a question, this Court would have no occasion to revisit *Jones*.[2]

A related reason for denying the petition is that no clarification of *Jones* by this Court would affect the outcome of this action. Both the hierarchical/congregational analysis and the neutral principles analysis would produce the same judgment in this case. *See Primate and Bishops' Synod*, 418 Mass. at 1002; 35 Mass. App. Ct. at 196, n.3. Even an outright overruling of *Jones*, therefore, would amount to nothing more than an advisory opinion.

II. The Judgment Below Does Not Conflict With Prior Decisions of This Court or Any State Court of Last Resort.

The Synod spends most of its energy attempting to portray the "chaos and confusion" which *Jones* allegedly has caused in the lower courts. Petition 12. The portrayal is irrelevant, since the present action does not involve *Jones*. Respondents therefore will not detain the Court with a discussion of how *Jones* has affected the Presbyterian and Episcopalian churches.[3] Respondents will address briefly, however, the Synod's references to Rules 10.1(b) and 10.1(c). Petition 13.

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[2] In other words, this case presents no substantial federal question. *See Maryland and Virginia Eldership*, 396 U.S. at 368 (appeal dismissed for want of substantial federal question).

[3] Respondents do not share the Synod's stated fear that *Jones* will transform Presbyterians and Episcopalians into "quasi-Baptists". Petition 23.

The judgment below does not conflict with applicable decision of this Court. *See* Rule 10.1(c), Rules of the Supreme Court of the United States. To demonstrate a conflict, the Synod cites only two cases, *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1954), and *Serbian Eastern Orthodox Church* v. *Milivojevich*, 426 U.S. 696 (1976)., According to the Synod, both cases "assume correctly that the polity of these religious organizations is hierarchical". Petition 13.

It surpasses irony for the Synod to rely upon *Kedroff* for proof of its hierarchical stature, because ROCOR was the losing party in that case. *See Kedroff*, 344 U.S. at 105. Leaving that factor aside, the case does not stand for the Synod's proposition.

The classification of a church as hierarchical or congregational is a question of fact. *See Antioch Temple, Inc.* v. *Parekh*, 383 Mass. at 862. Thus, the *Kedroff* court's characterization of ROCOR as "hierarchical" has no probative value in this action. Neither party in *Kedroff* contested the characterization, because both parties were hierarchies; ROCOR's structure was neither litigated nor decided. This Court simply assumed that both ROCOR and its protagonist, the Moscow Patriarchate, were hierarchical. Furthermore, *Kedroff* did not touch upon the relationship between ROCOR and its member churches. No local church was a party.

Kedroff arose from a dispute over the appointment of a bishop. Respondents never have questioned the Synod's hierarchical authority with respect to such canonical matters as the appointment of a bishop. Respondents have argued only that the Synod's ecclesiastical authority does not extend to secular ownership and control of property purchased by local church organizations which voluntarily have become affiliated with ROCOR. This issue was absent from *Kedroff*, which was not a church property case. The case was "strictly a matter of ecclesiastical government." *Kedroff*, 344 U.S. at 115. It is of

no consequence, therefore, that this Court assumed the Russian Orthodox Church to be a "hierarchical" church. *Kedroff*, 344 U.S. at 101.

The Court held in *Kedroff* that a state could not intervene legislatively to determine which of two competing bishops was the true bishop. *Kedroff*, 344 U.S. at 117-19. In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. at 698, the Court held that a state could not achieve the same result by intervening judicially.

The Synod cites *Milivojevich* because this Court referred to the Serbian Eastern Orthodox Church as "hierarchical". *Id.* at 699. The reference has no bearing on the present case, because (1) the present case does not involve the Serbian Eastern Orthodox Church, (2) the characterization of the church's structure was not contested, (3) the case was not a property dispute, and (4) no local church was involved.

The goal of the Synod's argument, of course, is to establish that this Court has held ROCOR to be hierarchical, while the Supreme Judicial Court has held the opposite. The argument overlooks a basic truth of the present action: the Supreme Judicial Court did *not* find ROCOR to be non-hierarchical. The Court agreed with the trial court's finding that ROCOR *is* hierarchical in matters of faith and polity. 418 Mass. at 1001. The Court's ruling of congregationality applies only to the Corporation, not to ROCOR. *Id.* Contrary to the Synod's assertion, therefore, the Massachusetts courts have not transformed the members of the Synod into Baptists or Congregationalists. Petition 25.

The Synod also argues that the judgment below conflicts with decisions of other state courts of last resort. Petition 13; *see* Rule 10.1(b), Rules of the Supreme Court of the United States. For that proposition the Synod cites two cases, *Draskovich* v. *Pasalich*, 280 N.E.2d 69, 79 (Ind. App. 1972), and *Piletich* v. *Deretich*, 328 N.W.2d 696, 699 (Minn. 1982). Both

cases arose from the defrockment of Bishop Dionisije Milivojevich and the reorganization of his diocese, as did *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

Rule 10.1(b), by its express terms, covers the situation where two state courts have rendered conflicting decisions on the same federal question. The only federal question addressed in both *Draskovich* and *Piletich* was whether the civil courts have jurisdiction to decide the propriety of a diocesan reorganization. The Indiana and Minnesota courts gave the same negative answer. *Draskovich*, 280 N.E.2d at 79; *Piletich*, 328 N.W.2d at 699. This Court later agreed. *Milivojevich*, 426 U.S. at 721. The present case presents no such question.

The Synod tries to finesse Rule 10.1(b) by arguing that the present case is in conflict with (1) *Draskovich's* determination that the Serbian Eastern Orthodox Church is entirely hierarchical and (2) *Piletich's* determination that the Serbian church is not hierarchical with respect to control of local property. *Draskovich*, 280 N.E.2d at 81; *Piletich*, 326 N.W.2d at 699-700.

Among the many flaws in the Synod's argument, the most glaring one is the fact that the present case involves the Russian Orthodox Church, not the Serbian Eastern Orthodox Church. The Serbian church functions under national and diocesan constitutions which bear little apparent resemblance to ROCOR's Regulations. *See Draskovich*, 280 N.E.2d at 72-74 (diocesan constitution), 74-76 (national constitution). The governing documents of the local churches which were involved in *Draskovich* and *Piletich* also appear to differ substantially from those of the Massachusetts corporation. Because the fundamental facts of *Draskovich* and *Piletich* differ so much from those of the present case, it cannot be said that there is *any* conflict, much less a federal question conflict, between the present case and the other two.

Conclusion.

Since this case does not involve *Jones* v. *Wolfe*, it cannot serve as a vehicle for the Court to revisit *Jones* v. *Wolfe*. The Supreme Judicial Court's decision represents a mainstream application of the traditional hierarchical/congregational analysis, with no constitutional implications. Finally, the Massachusetts decision does not conflict with decisions by this Court or by state courts of last resort. The Synod's petition should be denied.

Respectfully submitted,

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